

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

WILLIAM CONNOLLY and ROSS W.  
THIBAudeau,

Defendants-Appellees.

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UNPUBLISHED

April 23, 2002

No. 232631

Wayne Circuit Court

LC No. 97-500114-01

97-500114-02

Before: White, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

The prosecution appeals as of right the orders granting defendants' motion to dismiss the charges of conspiracy to possess with the intent to deliver five to forty-five kilograms of marijuana, MCL 333.7401(2)(d)(ii), brought against defendants, William Connolly and Ross W. Thibaudeau, and the charge of possession of a firearm during the commission of a felony, MCL 750.227b, brought against Connolly. We reverse and remand.

The prosecution argues that the trial court erred in granting defendants' motions to dismiss the charges against them for a speedy trial violation. We agree. An issue regarding whether a defendant was denied the constitutional right to a speedy trial involves a mixed question of law and fact. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). We review the trial court's findings of fact under the clearly erroneous standard. *Id.* We review constitutional questions of law de novo. *Id.*

"A criminal defendant has a constitutional . . . right to a speedy trial." *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000), citing US Const Ams VI and XIV; Const 1963, art 1, § 20; MCL 768.1. This Court applies a four-part balancing test in determining whether a defendant has been denied the right to a speedy trial, which includes (1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) prejudice to the defendant from the delay. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999), citing *Barker v Wingo*, 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972).

If the delay is under eighteen months, the defendant must prove that he or she suffered prejudice. *Cain*, *supra* at 112. If the delay is more than eighteen months, the delay is presumed to be prejudicial, and the prosecution bears the burden of proving lack of prejudice to the defendant. *Gilmore*, *supra* at 459. "The establishment of a presumptively prejudicial delay

‘triggers an inquiry into the other factors to be considered in the balancing of the competing interests to determine whether a defendant has been deprived of the right to a speedy trial.’” *Id.*, quoting *People v Wickham*, 200 Mich App 106, 110; 503 NW2d 701 (1993).

The first factor involves the length of the delay. In this case, there was a delay of 1,534 days, or approximately four years and three months. Without an explanation, this period of delay would be deemed excessive; however, a lapse of time, alone, does not cause a court to lose jurisdiction. *People v Garvin*, 159 Mich App 38, 46; 406 NW2d 469 (1987). Additionally, this Court has noted that the length of the delay is not determinative of a speedy trial claim. *Cain*, *supra* at 112.

The second factor questions the reasons for the delay. In this case, defendants previously brought a motion to dismiss based on a claim of entrapment. The trial court entered a dismissal, from which the prosecution appealed. This Court reversed the trial court’s decision to dismiss the charges on the basis of a finding of entrapment. *People v Connolly*, 232 Mich App 425, 426, 432; 591 NW2d 340 (1998). Defendants filed an application for leave to appeal with the Michigan Supreme Court, which was denied on June 29, 1999. *People v Connolly*, 460 Mich 867; 598 NW2d 341 (1999). In *Wickham*, *supra* at 111, this Court determined that the delay between the dismissal without prejudice and the reinstatement of the charge should not be attributed to either party because there is no charge pending during that period. Additionally, “time reasonably consumed on appeal cannot be considered as in derogation of a speedy trial.” *People v Chism*, 390 Mich 104, 113; 211 NW2d 193 (1973). Therefore, the time from the original dismissal to the denial of defendants’ application for leave to appeal should not be included in the speedy trial calculation. This leaves a period of 751 days in the speedy trial calculation.

The time needed to adjudicate defense motions is charged to the defendant. *Gilmore*, *supra* at 461. Defendants brought a motion to dismiss on entrapment grounds, which accounted for sixty-one days, brought a second motion to dismiss on speedy trial violation grounds, which accounted for seven days of delay, and Thibaudeau requested an adjournment, which accounted for seven days of delay. Removing these days from the speedy trial calculation leaves 676 days.

Delays caused by the court system are attributed to the prosecution; however, this type of delay is given a neutral tint and weighs minimally in a determination of whether a defendant’s right to a speedy trial has been violated. *Wickham*, *supra* at 111. There were at least eighty-five days of delay caused by the court system beginning October 2, 2000, which will be attributed to the prosecution, but will receive minimal weight in the speedy trial calculation.

Unexplained delays must be attributed to the prosecution. *People v Atkinson*, 120 Mich App 723, 733; 328 NW2d 102 (1982). From June 29, 1999, through October 2, 2000, no action was taken on this case. The prosecution is unable to explain the reason for this delay of 461 days; hence, this period must be attributed to the prosecution.

The third factor looks at a defendant’s assertion of the right to a speedy trial. This has become a very important factor in the balancing test. See *Cain*, *supra* at 113-114; *Wickham*, *supra* at 112. Defendants claim that they first asserted the right to a speedy trial on October 20, 2000; however, there is no record support of defendants’ request for a speedy trial, other than defendants’ motion to dismiss this case on the basis of a speedy trial violation on January 12,

2001. Regardless of when defendants first raised the issue of a speedy trial violation, it is clear that there was no mention of this right for at least fifteen months after the Michigan Supreme Court denied defendants' application for leave to appeal.

The fourth factor requires prejudice to the defendant as a result of the delay. In analyzing this last factor, there are two types of prejudice, including prejudice to the person and prejudice to the defense. *Gilmore, supra* at 461-462. An example of prejudice to the person includes an incarceration period of the defendant. *Id.* at 462. Apparently, neither defendant has been incarcerated since the original dismissal of this case. Connolly argues that he has suffered from two separate heart attacks since the charges were instituted. Anxiety, in and of itself, is insufficient to establish a violation of a defendant's right to a speedy trial. *Id.* Examples of prejudice to the defense include the absence of witnesses or the fading of witnesses' memories. *Wickham, supra* at 112-113. There is no evidence in the record that defense witnesses are now unavailable or that witnesses' memories have faded, and there is no evidence that any exculpatory evidence is missing or has been destroyed.

In sum, we conclude that although there was a delay in excess of eighteen months attributable to the prosecution, the prosecution was able to rebut the presumption that defendants were prejudiced by the delay. Further, defendants did not timely assert their right to a speedy trial. Accordingly, we reverse the trial court's decision dismissing the charges against defendants and remand this case for further proceedings.<sup>1</sup>

Reversed and remanded. We do not retain jurisdiction.

/s/ Helene N. White  
/s/ William B. Murphy  
/s/ E. Thomas Fitzgerald

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<sup>1</sup> The prosecution also argues that additional time leading up to the first dismissal should be excluded. The principles behind this argument were discussed in *Wickham, supra* at 110; however, we need not decide this issue because we find that the prosecution was able to rebut the presumption that defendants were prejudiced by the delay.